No. 80-823

In the Supreme Court of the United States

OCTOBER TERM, 1980

SALVADOR CHARLES BASSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

CAROLYN L. GAINES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the district court erred in quashing the warrant for the arrest of petitioner for the violation of his probation.

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JURISDICTION

The judgment of the court of appeals was entered on September 23, 1980. The petition for a writ of certiorari was filed on November 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted on January 14, 1977, in the United States District Court for the District of Connecticut, of tax evasion, in violation of 26 U.S.C. 7201. He was sentenced to a term of three years' imprisonment and fined $4,000. His prison sentence was suspended and he was placed on two years' probation (Pet. App. 3a).

After petitioner was placed on probation, he was supervised by Joseph Gagne, a federal probation officer in Bridgeport, Connecticut (Tr. 50, 147-148). Gagne informed petitioner of the conditions of his probation, including condition No. 2, which required the probationer to associate only with law abiding persons (Tr. 25-26, 154-156). On November 28, 1978, the supervision of petitioner's probation was transferred to probation officer David Pond (Pet. App. 3a; Tr. 18, 50-54). Pond met with petitioner on December 12, 1978 (Tr. 107-119); the next day Pond and his supervisor filed a petition for a warrant to arrest petitioner for violating his probation. The petition was made on a document known as Probation Form No. 12, and was supported by a two-page memorandum (Pet. App. 4a).[1]

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[1]The petition states in pertinent part (*ibid.*):

> "Comes now David W. Pond PROBATION OFFICER OF THE COURT presenting an official report upon the conduct and attitude of probationer Salvador Charles Basso . . . .
>
> "RESPECTFULLY PRESENTING PETITION FOR ACTION OF COURT FOR CAUSE AS FOLLOWS:
>
> On October 21, 1977, at the Pin-Up Restaurant / Lounge, Fairfield Avenue, Bridgeport, Connecticut, probationer Basso is alleged to have met with Ilario 'Lefty' Regina, William Herman Dorman

The warrant issued on December 18, 1978, but it was never executed. Instead, petitioner, accompanied by counsel, appeared the next day before a magistrate and was immediately released on his own recognizance. Thereafter, he filed numerous motions, including a motion to dismiss the petition for revocation of probation and to quash the probation violation arrest warrant for lack of probable cause (Pet. App. 5a).[2]

On March 12, 1979, a hearing was held in the district court on these motions (Pet. App. 22a). Almost eight months later, that court issued a lengthy Memorandum of Decision (Pet. App. 20a-101a), concluding, *inter alia*, that the Form No. 12 application failed to meet the probable cause requirement of the Fourth Amendment in that it failed to contain the requisite factual allegations and was not made under oath (Pet. App. 67a-69a). That court excluded the accompanying memorandum from consideration, because the contents of the memorandum were not disclosed to petitioner and were not "within"

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and Arnold Francis Russo, all of whom have criminal records, all in violation of Condition No. 2 of the Conditions of Probation, which states that, 'you shall associate only with law-abiding persons' . . . ."

"PRAYING THAT THE COURT WILL ORDER a Warrant to issue, said Warrant to serve as a temporary mittimus pending arraignment."

The accompanying memorandum reported that state trooper Robert Blair, acting in an undercover capacity, had attended the meeting called by petitioner in which he mediated a dispute among the other participants concerning the use of pinball machines for illegal gambling (Pet. App. 3a-4a; Tr. 36-45); the memorandum also noted that petitioner was believed by law enforcement authorities to be a "well insulated and low-key Mafia figure" (Pet. App. 4a).

[2]At a conference held on February 22, 1979, petitioner's counsel asked to inspect the two-page memorandum that had accompanied the application for an arrest warrant. Initially this request was denied due to the confidential information in the memorandum concerning undercover activity, but on March 6, 1979, petitioner was given a copy (Pet. App. 5a, 30a).

Form No. 12 (Pet. App. 67a). Based on these conclusions, the court quashed the arrest warrant (Pet. App. 69a). It also found that the probation office and Officer Pond had not abused their discretion or acted arbitrarily in prosecuting the charge against petitioner, and that there was probable cause to believe petitioner had violated a valid condition of his probation (Pet. App. 101a).

The government appealed, and on September 23, 1980, the court of appeals issued a decision remanding the case. In its opinion, the court emphasized first that, even if the arrest warrant were invalid, that would not justify dismissing the probation revocation proceedings against petitioner (Pet. App. 7a-10a).[3] The court then concluded that the arrest warrant application was sufficient, but even if it was faulty "in some narrow technical sense (and we are not convinced that it was), this defect should not be sufficient to void the warrant when the facts alleged in the petition and the accompanying memorandum established probable cause, as the district judge conceded, to believe that a violation had taken place" (Pet. App. 14a).

ARGUMENT

Petitioner contends (Pet. 17-34) that the warrant for his arrest was invalid because it was not issued upon a proper showing of probable cause.[4]

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[3]In its original opinion, the court of appeals stated that the district court had informed the United States Attorney that it had dismissed the case (Pet. App. 7a); the court of appeals accordingly reversed the order "insofar as it dismissed the probation revocation proceeding * * * with prejudice" (Pet. App. 10a). By an October 22, 1981, amendment to the opinion, the court of appeals deleted the reference to the district court's ex parte communication of its intent to the United States Attorney, and the reversal of the putative dismissal (Pet. App. 16a-19a). The amendment did not, however, alter the court's conclusion that any such "dismissal would be clearly erroneous" (Pet. App. 7a).

[4]Petitioner does not contend in this Court that the probation revocation proceeding should be dismissed (Pet. 16). The court of appeals was

This is, however, a purely academic question in the context of this case. Although the arrest warrant issued, petitioner was never taken into custody in reliance on it. Instead, he appeared voluntarily before a magistrate, and was immediately released on his own recognizance (Pet. App. 5a). Thus, the arrest warrant led to no seizure of evidence or deprivation of liberty. As the court of appeals stated (Pet. App. 10a), petitioner "never spent a moment in jail as a result of the arrest [and] * * * his defense has been in no way prejudiced by the existence of the quashed arrest warrant." Moreover, consideration of the case by this Court at this time would further postpone the holding of the probation revocation hearing, which has already been delayed for more than two years despite the requirement of 18 U.S.C. 3653 that the hearing be held "[a]s speedily as possible after arrest." Cf. *Cobbledick* v. *United States*, 309 U.S. 323 (1940).[5]

In any event, the court of appeals correctly concluded that the arrest warrant was valid. The evidence presented to the judge who issued it amply supported his independent determination that there was probable cause to believe that petitioner had violated his probation. The application and memorandum provided specific factual allegations that established the probability that petitioner had associated

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clearly correct in concluding that even if the warrant were invalid, petitioner would not be entitled to that remedy. See, *e.g.*, *United States* v. *Crews*, 445 U.S. 463, 474 (1980).

[5]If petitioner's conduct merits revocation, his probation should be terminated. If not, he should remain at liberty. The decision concerning petitioner's liberty, however, which has not been reached, should be made not on the basis of the validity of the warrant issued at the commencing of the proceedings but on the basis of the evidence presented at the probation revocation hearing.

with persons with criminal records, in violation of the condition of his probation.[6]

Petitioner's reliance (Pet. 22) on *United States* v. *Workman*, 585 F. 2d 1205 (4th Cir. 1978); *United States* v. *Bradley*, 571 F. 2d 787 (4th Cir. 1978); and *United States ex rel. Santos* v. *New York State Board of Parole*, 441 F. 2d 1216 (2d Cir. 1971), cert. denied, 404 U.S. 1025 (1972), is misplaced. None of these cases supports petitioner's assertion that the same rigorous standards that must be met for the lawful issuance of ordinary search and arrest warrants are equally applicable to the issuance of warrants to search or arrest parolees and probationers. Quite to the contrary, those decisions acknowledge that a reduced standard of cause applies to the issuance of warrants in the parole and probation setting. Similarly, Judge Hufstedler's dissenting opinion in *Latta* v. *Fitzharris*, 521 F. 2d 246, 257 (9th Cir.), cert. denied, 423 U.S. 897 (1975), upon which petitioner also relies (Pet. 22), recognizes that the probable cause showing in the parole and probation context may include information from informants whose reliability has not been tested.[7]

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[6]Indeed, the application alone, which precisely stated the place and date of the meeting, gave the names of the other participants, and stated that they all had criminal records (page 1 note 1, *supra*), adequately alleged facts establishing that a condition of probation had been violated. Cf. *United States* v. *Polito*, 583 F. 2d 48, 52 (2d Cir. 1978); 28 C.F.R. 2.44(a).

[7]Here, however, the identity and reliability of the person supplying the information on which the warrant application was based was established by the supporting memorandum. As the court of appeals stated (Pet. App. 13a):

> This is not a case where the neutral magistrate was left unapprised of either the identity or the reliability of the confidential source conveying the needed information. See, *e.g.*, *Aguilar* v. *Texas*, [378 U.S. 108, 113 (1964)].

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

CAROLYN L. GAINES
Attorney

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